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LYSAGHT (MALAYSIA) SDN BHD v. LIEW SWEE MIO

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[ORIGINATING SUMMONS NO: WA-24NCC-474-09-2019]
30 AUGUST 2021

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Abstract – *The court's consideration in an application by the company for an order to validate resolutions passed at an inquorate board meeting pursuant to s. 582 of the Companies Act 2016, in the main, is whether such an order would not do injustice to the company or to any member or creditor. Lack of quorum is a procedural irregularity that may be validated as expressed by s. 582(3). The court, in the exercise of its discretion to allow the application, is to ensure that the validation order would not result in substantial injustice.*

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COMPANY LAW: *Resolutions – Resolution by company – Inquorate meetings – Application for validation of resolutions – Whether exercise of court's discretion – Factors considered by court – Whether inquorate meeting procedural irregularity – Whether validation order would result in substantial injustice to directors and shareholders of company – Whether existence of 'deadlock right' against company could be overridden by court – Whether validation sought was precise – Whether exercise of discretion in favour of company justified – Companies Act 2016, s. 582*

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COMPANY LAW: *Directors – Resolution – Application for validation of resolutions – Inquorate meetings – Affidavits signed by managing director on behalf of company – Managing director foreign citizen – Whether authorised to affirm affidavits – Whether required employment pass – Whether employee – Whether involved in day-to-day operations of company – Whether 'interested person' pursuant to s. 582(3) of Companies Act 2016 – Whether agent of necessity*

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The plaintiff, an investment holding company, had three classes of shareholders holding ordinary A shares, ordinary B shares and ordinary C shares. Prior to 18 September 2015, there were two Class A shareholders, Chew Bros and United Engineers Limited ('UEL'). UEL disposed of all its Class A shares to Chew Bros. Prior to UEL's exit in 2015, there had been difficulties in achieving quorum at the plaintiff's board meetings. There were only three board meetings within a span of 18 months. At the board meeting on 26 January 2016, the defendant and Yusuf, directors representing Class B and Class C shareholders respectively, took the position that a representative of UEL must be present for board meetings to be quorate, despite UEL having transferred its Class A shares to Chew Bros. Given their stance, the application to amend Articles 57, 80 and 97 ('OS 178') was made by Chew Meu Jong, the managing director of the plaintiff, which the court allowed in favour of Chew Meu Jong on 31 October 2018. No attempt was

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made to convene a board meeting in 2017, in view of the defendant and Yusuf's position and OS 178. Subsequently, despite attempts to convene the meeting, it did not proceed as a result of the absence of the defendant and Yusuf. In the meantime, the plaintiff was exposed to potential regulatory action by the Companies Commission of Malaysia for failing to adhere to the statutory obligations under the Companies Act 1965 ('CA 1965'). The Companies Commission had issued compound notices for the plaintiff's failure to file its annual return, to lay its profit and loss account for the year ended 31 December 2015 and to hold an annual general meeting in 2016. The plaintiff was therefore left with no choice but to proceed with inquorate meetings and hence, the filing of the present originating summons to validate the resolutions passed at the two board meetings held on 28 May 2019 and 3 June 2019 pursuant to s. 355 of the CA 1965 and/or s. 582 of the Companies Act 2016 ('CA 2016'). The plaintiff submitted that the validation of the first and the second resolutions were necessary to regularise the plaintiff's statutory affairs. The plaintiff argued that the validation did not affect the defendant's right as a director nominated by the Class B shareholders. In resisting the application, the defendant contended that it was not a procedural irregularity under s. 355 of the CA 1965 or s. 582 of the CA 2016 and that the validation of the resolutions passed in the inquorate board meetings would result in substantial injustice to the defendant. The defendant further argued that the plaintiff's regularisation was premature as well as tantamount to an abuse of the court's process as it bypassed s. 314 of the CA 2016. The defendant also raised a preliminary objection in respect of the affidavits signed and affirmed by Chew Meu Jong, an Australian citizen, contending that Chew Meu Jong did not have an employment pass which was often wrongly described as a work permit. It followed that she was not properly authorised to affirm affidavits and, as such, they should be ignored. The defendant also contended that Chew Meu Jong could not argue to be an agent of necessity as she lacked the authority to act as one. This was due to the fact that the resolution that sought to appoint her as a representative of the plaintiff had no legal standing as the resolutions have yet to be validated. Furthermore, there was no need for anyone to claim to be an agent of necessity as s. 582 of the CA conferred the right to move the court to 'any interested person'.

Held (allowing application with costs):

(1) The preliminary objection was dismissed as (i) Chew Meu Jong's appointment as the managing director, a title prescribed under the plaintiff's constitution, was not based upon her being an employee of the plaintiff. The company was purely an investment holding company which had no day-to-day operations; (ii) an employment pass is a work permit that enables an expatriate to take up employment with an organisation in Malaysia. The pass is subject to the contract of employment and Chew Meu Jong was not an employee of the plaintiff.

A Even if she was a director of the plaintiff, being a foreigner, there was no requirement under the law for her to possess an employment pass; (iii) the threshold under s. 582(3) of the CA 2016 allows for 'any interested person' and, based on the affidavit, Chew Meu Jong was an interested person; (iv) although Chew Meu Jong claimed to be an agent
B of necessity, in reality, she was merely a representative of the plaintiff. (paras 32-37)

(2) The curative provision for any irregularity in proceedings is in s. 582 of the CA 2016 and therefore, s. 582 was the correct redress for the plaintiff. The provision suggests that there is a presumption of validity,
C in that, the default position in law is that no proceeding is invalid because of any defect, irregularity or deficiency unless the court is satisfied that substantial injustice has been caused. Further, s. 582(3) of the provision would show an inquorate meeting is an irregularity which this court was entitled to consider. (paras 41-43)

D **(3)** The application of s. 355 of the CA 1965/s. 582 of the CA 2016 is an exercise of discretion by the court. The key consideration for the court, in the exercise of its discretion, is to ensure that any validation order would not result in substantial injustice. Mere prejudice is not a consideration. The injustice must be against the company or any of its
E members or creditors. The defendant, by refusing to attend the meetings, advanced the proposition that he had a 'deadlock right'. If indeed such a right either existed or resulted in this 'deadlock right', it may still be overridden by this court pursuant to s. 582 of the CA 2016. The two resolutions did not, in any manner affect WTWT's class rights as a Class
F B shareholder and however, a failure to validate them caused substantial injustice, not just to the plaintiff and its directors, but to all shareholders including the other shareholders in Class B. (paras 45, 46, 56, 57 & 59)

(4) Although the shareholders of the plaintiff may have negotiated a deadlock right, it did not oust this court's jurisdiction to override that
G deadlock right as the first resolution and second resolution sought to be validated did not cause any substantial injustice to the defendant or the Class B shareholders. The resolutions did not have the effect of allowing the Class A shareholder to gain complete control of the plaintiff and its subsidiaries. Further, the plaintiff was not seeking a blanket validation,
H instead, the validation sought was precise and was merely to ensure that the plaintiff would comply with the statutory requirements, primarily to approve the audited accounts and convene general meetings for that and other statutory business. (paras 60-62)

(5) The justice of this case could not be focused on the defendant's claim
I that he had been deprived of his right to veto. The interest of the plaintiff, its other directors, and its shareholders were equally crucial considerations. The provision for quorum had been repeatedly utilised

by the defendant in such a way as to amount to an abuse. The court recognised the resolutions in question were passed by four out of six directors and they were to ensure that the plaintiff complied with the statutory requirements and obligations. None of the resolutions affected the defendant directly as a director or as the controller of a Class B shareholder, WTWT. None of the resolutions would denude WTWT of its class rights. Hence, the need for the court's exercise of discretion in favour of the plaintiff, premised on a finding that no prejudice was found against the defendant if the resolutions passed were validated. (paras 69-72)

(6) Section 314 of the CA 2016 caters for a member's meeting and not a board of directors' meeting. Hence, s. 314 was not the appropriate avenue for the plaintiff to seek recourse. Not only is there an express provision under s. 582(3) of the CA 2016 that allows for recourse to be made to this court, it is also supported by precedent. As such, the argument that s. 314 was the proper recourse that ought to be taken by the plaintiff was without basis. (paras 74-77)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Chang Benety v. Tang Kin Fei [2012] 1 SLR 274 ***(refd)***

First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1982] 1 LNS 108 ***(refd)***

PP v. Tan Lee Kok [1998] 2 CLJ 286 CA ***(refd)***

Re Australian Continental Resources Ltd (1975) 1 ACLR 405 ***(refd)***

Re P W Saddington & Sons Pty Ltd (1990) 2 ACSR 158 ***(refd)***

Soh Chee Gee v. Syn Tai Hung Trading Sdn Bhd [2019] 6 CLJ 516 CA ***(refd)***

Tay Say Geok & Anor v. Tay Ek Seng Co Sdn Bhd [1974] 1 LNS 174 FC ***(refd)***

The Oriental Insurance Company Ltd v. Reliance National Asia Re Pte Ltd [2008] SLR 121 ***(refd)***

Whitehouse v. Capital Radio Network Pty Ltd and Others [2004] TASSC 12 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 150, 355

Companies Act 2016, ss. 251(1)(b), 257, 314, 346, 582(3)

Dangerous Drugs (Forfeiture of Property) Act 1988, s. 8

Companies Act [Sing], s. 392(6)(c)

Companies Ordinance 1962 [Aust], s. 366

For the plaintiff - Gopal Sreenevasan & PL Leong; M/s Sreenevasan Young

For the defendant - Lim Kian Leong, Annou Xavier, Yong Jia Wei & Joyce Goh; M/s Azri, Lee Swee Seng & Co

Reported by S Barathi

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JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] Enclosure 1 is the plaintiff's application pursuant to s. 355 of the Companies Act 1965 ("the CA 1965") and/or s. 582 of the Companies Act 2016 ("the CA 2016") to validate the plaintiff's board of directors' resolutions passed at two board meetings held on 28 May 2019 and 3 June 2019.

[2] The resolutions that the plaintiff sought to validate are as follows:

(i) approving the appointment of Mr Heng Chiang Pooh from FMS Management Services Sdn Bhd as the company secretary;

(ii) approving the audited financial statements for the years ended 31 December 2015, 31 December 2016 and 31 December 2017 for circulation to the shareholders and auditors at the forthcoming annual general meeting ("AGM");

(iii) approving the director's report and statement by directors, authorising the following directors, namely Chew Kar Yoo @ Chew Kar Hoo and Lim Fong Boon to sign the director's report and statement by directors for and on behalf of the board and approving the said director's report and statement by directors for inclusion with the audited financial statements for the years ended 31 December 2015, 31 December 2016 and 31 December 2017 respectively for circulation in accordance with s. 257 of the CA 2016;

(iv) authorising the director, Lim Fong Boon to sign the statutory declaration as the director/officer primarily responsible for the financial management of the plaintiff pursuant to s. 251(1)(b) of the CA 2016 and approving the statutory declaration for inclusion with the audited financial statements for the years ended 31 December 2015, 31 December 2016 and 31 December 2017 respectively for circulation in accordance with s. 257 of the CA 2016;

(v) to convene the 36th AGM after an order from this Honourable Court and authorising the Managing Director to fix the venue, date and time of the AGM thereafter as well as to authorise the Company Secretary to circulate the audited financial statements for the years ended 31 December 2015, 31 December 2016 and 31 December 2017 and to send the notice of AGM to all members and auditors; and

(Collectively referred to as "the first resolution");

(vi) appointing Sreenevasan Young to represent the plaintiff to file this application and to do all necessary things to regularise the plaintiff's board meeting held on 28 May 2019 ("the second resolution").

[3] After hearing parties, this court allowed encl. 1 with costs. These are the full reasons of this court's decision.

Background Facts

[4] The plaintiff's pleaded case has been set out in its submissions. This court adopts the facts as can be found in the submissions.

[5] The plaintiff is an investment holding company. It has three classes of shareholders namely shareholders holding Ordinary A shares, Ordinary B shares and Ordinary C shares. The current shareholding structure is as follows:

Shareholders	Total shares	(%)
Class A – Ordinary A shares		
Chew Bros (M) Sdn Bhd ("Chew Bros")	9,520,076	51.63
Class B – Ordinary B shares		
WTWT Sdn Bhd ("WTWT"')	3,152,270	17.10
George Anthony Dass David	234,412	1.27
Class C – Ordinary C shares		
Bina Securities & Management Sdn Bhd ("Bina")	2,353,009	12.76
Faroy Sdn Bhd ("Faroy")	1,843,826	10.00
Tan Sri Abdul Rashid bin Abdul Manaf	860,537	4.67
The Administrator of Puan Sri Zaiton binti Abu Bakar	438,983	2.38
Abu Zakaria bin Abu Bakar	35,100	0.19
Total	**18,438,213**	**100**

[6] There is thus a sole Class A shareholder, two Class B shareholders and five Class C shareholders.

[7] Prior to 18 September 2015, there were two Class A shareholders, Chew Bros and United Engineers Limited ("UEL"). UEL disposed of all its Class A shares to Chew Bros. This disposal was challenged by WTWT, a holder of the Class B shares, under the control of the defendant by way of Kuala Lumpur High Court Suit No. 24NCC-231-07-2014 ("the 231 Suit"). That challenge failed and the disposal was subsequently registered on 18 September 2015.

[8] There are class rights attached to the ordinary shares. Prior to 31 October 2018, art. 80 of the plaintiff's constitution (formerly known as the memorandum and articles of association) provided that the Class A shareholders are entitled to appoint three directors to the board with Chew Bros entitled to appoint two, one of whose nominees shall be Managing Director and UEL entitled to appoint one. Class B and Class C shareholders have a right to appoint one director each. This article together with arts. 57 and 97 were amended by an order of court dated 31 October 2018

[9] As a result of the amendments to arts. 57, 80 and 97:

(i) One Class A shareholders and one Class B shareholders must be present to meet the quorum requirement to transact at business at the plaintiff's general meeting;

(ii) Chew Bros as the sole Class A shareholder is entitled to appoint three directors to the plaintiff's board with one of its nominees as the Managing Director;

(iii) The two Class B shareholders have the right to appoint a director to the plaintiff's board;

(iv) The five Class C shareholders have the right to appoint a director to the plaintiff's board; and

(v) The quorum necessary for the transaction of business at the plaintiff's board meetings is three, including one director appointed by the Class A shareholder and one appointed by the Class B shareholders.

[10] The current board composition is as follows:

No.	Name	Date of Appointment	Class Representation
1.	Chew Meu Jong (Alt Director: Chua Tia Bon appointed on 18.4.1991)	29.3.1991	Class A
2.	Chew Kar Yoo @ Chew Kar Hoo ("Mr. Chew") (Alt Director: Lee Keat Chee appointed on 13.8.2015)	11.3.2014	Class A
3.	Lim Lee Kuan	18.9.2015	Class A
4.	Lim Fong Boon ("Lim") (Alt Director: Koh Tee Kiow @ Khoo Tee Keow appointed on 13.8.2015)	19.7.2011	N/A
5.	Defendant	15.4.2014	Class B
6.	Yusuf bin Jamil ("Yusuf")	29.4.2014	Class C

[11] At the board meeting held on 26 January 2016, the defendant and Yusuf took the position that a representative of UEL must be present (despite UEL having transferred its Class A shares to Chew Bros) for board meetings to be quorate. Given their stance, the application to amend to arts. 57, 80 and 97 were made by Chew Meu Jong in Kuala Lumpur High Court Originating Summons No. WA-24NCC-178-05-2017 ("OS 178").

[12] OS 178 was allowed in favour of Chew Meu Jong on 31 October 2018. Although the defendant (who was a party to OS 178) appealed against the decision of 31 October 2018, there was no stay of the effect of arts. 57, 80 and 97 as amended.

Inquorate Meetings

[13] Even prior to UEL's exit in 2015, there had been difficulties in achieving quorum at the plaintiff's board meetings.

[14] In 2014 alone, five notices to convene a board meeting were issued from mid-2014 but none proceeded because the defendant and Yusuf were absent. In 2015, two of the five meetings called did not proceed. Thus, there were only three board meetings within a span of 18 months.

[15] At the first board meeting convened in 2016 (on 26 January 2016), which was after UEL's exit, the defendant and Yusuf raised for the first time that there is no quorum in the absence of a director nominated by UEL. This was the last meeting where business was actually transacted by the plaintiff's board.

[16] In view of the defendant and Yusuf's position on the quorum requirement, Chew Meu Jong commenced OS 178 which outcome was earlier explained.

[17] No attempt was made to convene a board meeting in 2017 in view of the defendant and Yusuf's position and OS 178.

[18] Subsequent to that, no less than three attempts were made by Mr Chew to convene a board meeting. Each time, the meeting did not proceed as a result of the absence of the defendant and Yusuf.

[19] In the meantime, the plaintiff was exposed to potential regulatory action by the Companies Commission of Malaysia for failing to adhere to the statutory obligations under the 1965 Act. The Companies Commission has issued compound notices for the plaintiff's failure to file its annual return, to lay its profit and loss account for the year ended 31 December 2015 by 30 June 2016 and to hold an annual general meeting in 2016.

A **Regularisation**

[20] It was against this background that Mr Chew issued a notice dated 8 May 2019 to convene a board meeting for 28 May 2019. The agenda for this meeting was restricted only to deal with the appointment of the company secretary, approving the audited financial statements for the years ended
B 31 December 2015, 31 December 2016 and 31 December 2017 and to convene the 36th AGM. In short, the meeting was called to address the various statutory requirements.

[21] Apart from the defendant and Yusuf, all of the four other directors
C were present at the 28 May 2019 board meeting. They unanimously approved and passed the first resolution.

[22] Following the board meeting on 28 May 2019, Mr Chew issued a notice dated 28 May 2019 to convene another board meeting on 3 June 2019 to appoint Sreenevasan Young to act for the plaintiff to do all things
D necessary to regularise the board meeting held on 28 May 2019.

[23] Neither the defendant nor Yusuf attended the board meeting held on 3 June 2019. The other four directors were present. They unanimously approved and passed the second resolution.

E **[24]** The plaintiff claimed that it was left with no choice but to proceed with the inquorate meetings hence the filing of the present originating summons to validate the resolutions passed.

Parties' Contentions

F **[25]** In essence, the plaintiff submitted that the validation of the first resolution and the second resolution is necessary to regularise the plaintiff's statutory affairs. The validation, as argued by the plaintiff, does not affect the defendant's right as a director nominated by the Class B shareholders.

[26] In resisting the originating summons, the defendant contended that the
G application is not a procedural irregularity under s. 355 of the CA 1965 or s. 582 of the CA 2016 and that the validation of the resolutions passed in the inquorate board meetings would result in substantial injustice to the defendant. The defendant further argued that the plaintiff's regularisation is premature as well as tantamount to an abuse of the court's process as it bypasses s. 314 of the CA 2016.

H **[27]** The defendant also raised a preliminary objection in respect of the affidavits signed and affirmed by Chew Meu Jong, the Managing Director of the plaintiff who is an Australian citizen in that the affidavits ought to be expunged and not to be taken into consideration by this court on the sole ground that Chew does not have any authority to affirm any affidavit as a
I Managing Director of the plaintiff as she does not have a valid Malaysia work permit.

[28] The objection and submissions proffered by both parties will be examined below.

Analysis And Findings Of The Court

Preliminary Objection

[29] The defendant's preliminary objection is that Chew Meu Jong does not have an employment pass which is often wrongly described as a work permit. It follows, that she is not properly authorised to affirm affidavits and as such, they should be ignored.

[30] The defendant also contended that Chew Meu Jong cannot argue to be an agent of necessity as she lacked the authority to act as one. This is due to the fact that the resolution that sought to appoint her as a representative of the plaintiff has no legal standing as the resolutions have yet to be validated. Furthermore, there is no need for anyone to claim to be an agent of necessity as s. 582 of the CA 2016 confers the right to move the court to "any interested person".

[31] This court dismissed the preliminary objection for the following reasons stated below.

[32] Firstly, her appointment as Managing Director is not based upon her being an employee of the plaintiff. It was not disputed that the company was purely an investment holding company which has no day to day operations. The title of Managing Director is prescribed under the plaintiff's constitution.

[33] She is not an executive under the employment of the plaintiff. The Court of Appeal in *Soh Chee Gee v. Syn Tai Hung Trading Sdn Bhd* [2019] 6 CLJ 516*;* [2019] 2 MLJ 379 made clear the distinction between a person appointed to a company's board of directors and a person who is employed as an executive director. The latter is an employee but the former is not. The Court of Appeal held as follows:

> The plaintiff's claim is essentially premised on breach of fiduciary duty by the CEO of the company. The position in law of CEO is one of a fiduciary. Section 132 of the Companies Act 1965 prior to the recent amendments sets out in statutory form the duties of a director. *The defendant in the instant case is not a director of the Board of Directors of the plaintiff. The designation of 'Executive Director' denotes in the instant case, the name given to the position to which the defendant was appointed. The defendant however remained an employee at all material times. It appears that learned counsel for both the plaintiff and the defendant failed to appreciate the distinction between an employee who is appointed to a position called 'Executive Director' and a director on the Board of Directors.* In the circumstances therefore, s. 132 which is specifically for directors is not applicable for an employee such as the defendant.

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> However, as the defendant in his capacity as the CEO assumes a fiduciary position, the common law in relation to the duties and obligation of a fiduciary remains wholly relevant. As such the authorities relied upon by the parties are inapplicable, strictly speaking. (emphasis added)

[34] Secondly, a check with the Immigration Department website shows B that an employment pass is a work permit that enables an expatriate to take up employment with an organisation in Malaysia. The pass is subject to the contract of employment. Chew Meu Jong has admitted that she is not an employee of the plaintiff. There is no dispute over this fact.

[35] Even if she was a director of the plaintiff, being a foreigner, there is C no requirement under the law for her to possess an employment pass. In short, the Companies Act does not require a foreigner to possess an employment pass before being appointed as a director. As such, even without a work pass, it does not disqualify her as a deponent of the affidavit affirmed on behalf of the plaintiff.

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[36] Thirdly, the threshold under s. 582(3) of the 2016 Act is a very low threshold. It allows "any interested person". Certainly, Chew Meu Jong is an interested person based on the affidavit that she affirmed.

[37] Fourthly, although Chew Meu Jong claims to be an agent of necessity, E in reality, she is merely a representative of the plaintiff. Even if she was not one, it does not automatically disqualify her evidence. It is trite that even illegally obtained evidence is admissible, subject to the evidence passing the relevancy requirement.

[38] The Court of Appeal in *PP v. Tan Lee Kok* [1998] 2 CLJ 286, allowed F the reference for a claim of seized properties to the court under the Dangerous Drugs (Forfeiture of Property) Act 1988 despite there not being a formal reference under s. 8 by the Public Prosecutor. Shaikh Daud Ismail JCA ruled that:

> … since the matter was before the Sessions Court, and since that court G has jurisdiction to hear the reference, and has taken cognisance of and acted upon it, such a failure has not vitiated the reference.

[39] Thus, as the matter is before this court, it matters not how the case arrives for this court's consideration. This is consistent with the fact that this court is at liberty on its own motion, to consider the application of s. 582 H of the CA 2016.

[40] As such the preliminary objection was dismissed.

Application Of Section 582 Of The CA 2016

[41] The curative provision for any irregularity in proceedings is found in I s. 582 of the CA 2016. It is the view of this court that s. 582 is the correct redress for the plaintiff. It is apposite for s. 582 to be reproduced in its entirety. It reads as follows:

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused which cannot be remedied by any order of the Court.

(2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or any other provision of this Act, where any omission, defect, error or irregularity, **including the absence of a quorum at any meeting of the company** or of the directors has occurred in the management or administration of a company whereby:

(a) any breach of this Act has occurred;

(b) there has been default in the observance of the constitution of the company; or

(c) any proceedings at or in connection with any meeting of the company or of the directors or any assembly purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency under section 443, the Court:

(A) may, either of its own motion or on the application of any interested person, make such order as the Court thinks fit to:

(i) rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity; or

(ii) validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(B) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor;

(C) where any such order is made, may give such ancillary or consequential directions as the Court thinks fit; and

(D) may determine notice or summons to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how the notice or summons should be given or served and whether the notice or summons should be advertised in any newspaper.

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(4) The Court, whether the company is in process of being wound up or not, may extend or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such extension may be ordered although the application for the same is not made until after the time originally allowed or limited.

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(emphasis added)

[42] A read of the provision would suggest that there is a presumption of validity in that the default position in law is that no proceeding is invalid because of any defect, irregularity or deficiency unless the court is satisfied that substantial injustice has been caused. This is clear when the language employed reads as "No proceeding under this Act shall be invalidated".

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[43] Further, a read of s. 582(3) of the provision would show an inquorate meeting is an irregularity which this court is entitled to consider.

Onus On The Defendant

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[44] Walter Woon in *Woon's Corporation; Law Lexis Nexis*; 2019 in discussing a similar provision under the Singapore Companies Act opined that the burden lies with the party alleging substantial injustice to demonstrate why such an irregularity can invalidate a proceeding. It does not lie with the persons seeking to uphold the proceedings or meetings. Further,

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it must be shown that there is a nexus between the procedural irregularity that has occurred and the matters of prejudice relied upon as constituting injustice that cannot be remedied by any order of court.

Exercise Of Discretion

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[45] Whether or not a court is to apply its powers under s. 582 of the CA 2016 is ultimately an exercise of discretion. The Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 held that the application of s. 355 of the CA 1965 (the equivalent provision to s. 582 of the CA 2016) is an exercise of

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discretion by the court.

The Test

[46] The key consideration for the court, in the exercise of its discretion, is to ensure that any validation order would not result in substantial injustice. Mere prejudice is not a consideration. The injustice must be against the

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company or any of its members or creditors.

[47] Reference is made to the case of *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405. In explaining the application of s. 366 of the Australian Companies Ordinance 1962, which is in *pari materia* with s. 355 of the CA 1965 and very similar to s. 582 of the CA 2016, Blackburn J held:

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> Some argument occurred on the connotation of the word "injustice" in this paragraph. *In my opinion it necessarily implies a consideration of the relative gains or losses of the parties involved.* Counsel for the respondents sought to persuade me that in effect the word "injustice" meant "loss". The word "prejudice" was the one he actually used in argument, and I use it here in the sense of loss or "harm". The gist of his argument was that if the order proposed would cause prejudice to the company, member, or creditor in question, that in itself was enough to preclude the making of the order, without regard to the effect of the order upon the rights of any other party. *I think this construction is incorrect, and that it would make the section far less useful. In my opinion the task of the Court, in complying with paragraph (e), will not be complete merely upon its satisfying itself that the order proposed would not cause prejudice (in the sense indicated) to any person of the classes mentioned. Such an order may well do so. Prejudice is not the criterion; justice is; and justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.*
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> (emphasis added)

[48] The *dicta* of Blackburn J in *Re Australian Continental Resources Ltd* has been consistently approved and adopted by the Malaysian and Singaporean courts. In *Aik Ming (M) Sdn Bhd & Ors* (*supra*), the Court of Appeal held, in relation to s. 355 of the CA 1965:

> Now it is clear that **the section looks to the justice of a particular** case: it is **not concerned with the question whether prejudice** would result in the making of a validation order. (See *Re Australian Continential Resources Ltd* (1975) 1 ACLR 405). (emphasis added)

[49] In *The Oriental Insurance Company Ltd v. Reliance National Asia Re Pte Ltd* [2008] SLR 121, CA the Court of Appeal in Singapore held that it must refer to something greater than just ordinary prejudice. (See also *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1982] 1 LNS 108; [1983] 2 MLJ 76).

[50] In *Chang Benety v. Tang Kin Fei* [2012] 1 SLR 274, a case that was relied upon by the defendant, the court was faced with an issue similar to the present case. In *Chang Benety*, the appellants and the respondents were directors of a company, PPL Shipyard Pte Ltd. Prior to 2003, PPL Holdings Pte Ltd (referred to as "PPLH" in the judgment) held 50% of the company and Sembcorp Marine Ltd (referred to as "SCM" in the judgment) held the balance 50%. PPLH and SCM entered into a shareholders' agreement which provided for the appointment of six directors, with PPLH and SCM appointing three directors each. Clause 5.3 provided that the quorum for a director's meeting was two with at least one director from PPLH and SCM present. The company's articles of association were amended to take into account this agreed arrangement. In 2003, SCM increased its shareholding to 85%. The composition of the board was enlarged from six to nine. SCM

A appointed six of the nine directors. The appellants were the directors nominated by PPLH and the respondents were SCM's appointees. The respondents commenced the action pursuant to s. 392 of the Singapore Companies Act seeking to validate resolutions passed at three board meetings which were inquorate as none of the appellants attended the meetings.

B **[51]** Section 392 of the Singapore Companies Act is similar to s. 582 of the CA 2016. Section 392 of the Singapore Companies Act provides as follows:

Irregularities

392(1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to:

C

(a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and

(b) a defect, irregularity or deficiency of notice or time.

D

(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity **unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice** that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

E

(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated by reason only of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or the Registrar, declares proceedings at the meeting to be void.

F

(4) Subject to the following provisions of this section and without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

G

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of this Act or a provision of any of the constituent documents of a corporation;

H

(b) an order directing the rectification of any register kept by the Registrar under this Act;

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(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned expired before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding, and may make such consequential or ancillary orders as the Court thinks fit.

(5) An order may be made under subsection (4)(a) or (b) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) The Court shall not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in subsection (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is in the public interest that the order be made;

(b) in the case of an order referred to in subsection (4)(c), that the person subject to the civil liability concerned acted honestly; and

(c) in every case, that no substantial injustice has been or is likely to be caused to any person.

[52] The appellants in *Chang Benety* argued:

(i) that the lack of quorum was a substantive irregularity incapable of being validated under s. 392; and

(ii) even if the lack of quorum was a procedural irregularity, it could not be cured under s. 392 as this would lead to substantial injustice.

[53] The Singapore Court of Appeal after reviewing rejected the contention and held as follows:

[43] It follows that the Appellants' contention that the lack of quorum in the present case must be a substantive irregularity merely because the parties had expressly negotiated for a deadlock right cannot be accepted. In *Sum Hong Kum*, where deadlock rights were also involved in the context

A of an inquorate meeting, Warren L H Khoo J ("Khoo J") correctly found that in view of s. 392(1), the lack of a quorum was without more, a procedural irregularity. *We respectfully agree with Khoo J and are of the view that the lack of a quorum in the present case is a procedural irregularity.* Consequently, the Adjournment irregularity, which arises from the Quorum irregularity, is also procedural. *However, this does not mean that the Appellants' contention* B *was wholly without merit when viewed from the perspective of substance (as opposed merely to form) inasmuch as the court will not validate a procedural irregularity if to do so would be – or is likely – to cause substantial injustice to any person* (see s. 392(6)(c) reproduced above at [28]). *Put simply, such an approach would achieve, in substance, the same result which the Appellants had sought in any event provided that they could demonstrate that substantial injustice had indeed been* C *suffered by them. And that is an issue to which our attention now turns.*

(emphasis added)

[54] The Singapore Court of Appeal refused to validate the resolutions as it held that to do so would cause substantial injustice to PPLH directors. This was because the resolutions passed in the absence of PPLH directors were D to appoint solicitors, not only to advise the company on a suit commenced by SCM but also to investigate complaints made by SCM against the PPLH directors. These were over and above the bargain struck between the company's solicitors and that of the solicitors for the PPLH directors on the scope of the company's solicitors' retainer to the disadvantage of the PPLH E directors. The procedural impropriety was linked to the substantial injustice suffered by the PPLH directors as without the resolutions, the company would be bound by the bargain struck.

[55] The key consideration for the Singapore Court of Appeal was the phrase "substantial injustice" which appears in s. 392(6)(c) of the Singapore F Companies Act.

[56] In the present case, the plaintiff seeks to validate resolutions passed at two board meetings which were inquorate due to the defendant's absence. Similar to *Chang Benety*, the defendant advances the proposition that he has G a "deadlock right", by refusing to attend the meetings.

[57] This court is in agreement with the submissions of the plaintiff that if indeed such a right either exists or results in this "deadlock right", it may still be overridden by this court pursuant to s. 582 of the CA 2016 as held by the Singapore Court of Appeal in respect of s. 392 of the Singapore H Companies Act. This is so given the similarities between s. 582 of the CA 2016 and s. 392 of the Singapore Companies Act.

[58] Furthermore, this court is aided by the express wordings in s. 582(3) of the CA 2016 which provides the lack of quorum as an irregularity that may be validated. The caveat, however, is that this court ought only to make

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such an order to validate the irregularity if "before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor". A

[59] It is clear to this court that the two resolutions do not, in any manner affect WTWT's class rights as a Class B shareholder and however a failure to validate them causes substantial injustice not just to the plaintiff and its directors, but to all shareholders including the other shareholders in Class B. B

[60] Therefore, although the shareholders of the plaintiff may have negotiated a deadlock right, it does not oust this court's jurisdiction to override that deadlock right as the first resolution and second resolution sought to be validated do not cause any substantial injustice to the defendant or the Class B shareholders. C

[61] The defendant has failed to substantiate his argument of how the resolutions would allow the Class A shareholder to gain complete control of the plaintiff and its subsidiaries. D

[62] It is the view of this court that the resolutions do not have this effect. It is clear that the plaintiff is not seeking for a blanket validation. The validation sought is precise and is merely to ensure that the plaintiff would comply with the statutory requirements, primarily to approve the audited accounts and convene general meetings for that and other statutory business. E

[63] To recapitulate, the most important consideration is to determine whether the resolutions if validated, would result in substantial injustice to the defendant. In this respect, the defendant in his evidence has not placed any material before this court which goes to show how these resolutions in and of themselves prejudice him and in turn, would result in substantial injustice to him. He has not, for example said that the accounts are misstated. F

[64] Other cases referred to by the defendant in demonstrating that the lack of quorum is not a procedural irregularity include *Re P W Saddington & Sons Pty Ltd* (1990) 2 ACSR 158 and *Whitehouse v. Capital Radio Network Pty Ltd and Others* [2004] TASSC 12. It is observed that all the cases bear the common theme that one has to look at the effect of the resolutions which the plaintiff now seeks to validate. G

Duty Of The Court

[65] In exercising its discretion, this court is obliged to consider the interest of the other shareholders apart from the plaintiff itself. As such, it behoves this court to consider the arguments made by parties carefully. H

[66] Mr Lim Kean Leong for the defendant in his usual candour admitted that there was a deliberate act on the part of the defendant to not attend the meetings. It was plainly admitted that it was meant to frustrate the Group I

A shareholder from achieving a quorum for the meetings. It was argued by counsel that this was the check and balance mechanism built into the constitution of the plaintiff.

[67] Counsel submitted that persistent absence will inevitably lead to the existence of the plaintiff coming to an end. That being the ultimate objective of the defendant, it came to no surprise that the defendant initiated a winding-up action against the company in Kuala Lumpur High Court Companies (Winding Up) Petition No: WA-28NCC-1315-12-2019. However, the petition in which WTWT is the petitioner was dismissed by the winding-up court. An action was also brought by WTWT against the company for an action under s. 346 of the CA 2016 *vide* Kuala Lumpur Originating Summons No: WA-24NCC-552-12-2017. There too, the defendant failed to obtain a judgment in his favour.

[68] Mr Gopal Sreenevasan for the plaintiff however emphasised the need to regularise the plaintiff's statutory affairs. Of paramount importance is the adherence with the statutory requirements mandated under the laws administered by the Companies Commission of Malaysia. He pointed out that the last AGM was held on 13 April 2015. This was prejudicial to all of its other shareholders apart from WTWT. It was also pointed out that there is another Class B shareholder, whose interests ought to be represented by the defendant as WTWT director. Yet, the defendant did not consider the Class B shareholders' interest but only the interest of WTWT, his own company.

[69] In exercising its discretion, this court has to balance the interest of all parties. The justice of this case cannot be focused on the defendant's claim that he has been deprived of his right to veto. The interest of the plaintiff, its other directors, and its shareholders are equally crucial considerations. Thus, this court will have to assess the defendant's conduct and at the same time consider the effect of the resolutions sought to be validated in this proceedings.

[70] This court is persuaded by the plaintiff's argument that the provision for a quorum has been repeatedly utilised by the defendant in such a way as to amount to an abuse.

[71] This court recognises the resolutions in question were passed by four out of six directors and they were to ensure that the plaintiff complied with the statutory requirements and obligations. None of the resolutions affect the defendant directly as a director or as the Controller of a Class B shareholder, WTWT. None of the resolutions would denude WTWT of its class rights as asserted by the defendant.

[72] It is based on these considerations that this court finds the need to exercise its discretion in favour of the plaintiff. This exercise of discretion is premised by a finding of no prejudice is found against the defendant if this court validates the resolutions passed.

[73] The plaintiff is seeking to hold an AGM. The remaining Class B shareholder as well as all the other shareholders must also be allowed to exercise their rights as members of the plaintiff. The defendant by refusing to attend the plaintiff's board meetings purported to do so in the interest of the Class B and Class C shareholders. However, it can never be in the interest of any shareholders for a company to not hold an AGM.

Court Convened Meeting As The Appropriate Recourse

[74] The defendants also argued that the plaintiff was bypassing a statutory provision of applying for a court convened meeting under s. 314 of the CA 2016. This court is unable to agree with the contention that s. 314 is the appropriate avenue for the plaintiff to seek recourse based on the facts of the case.

[75] Not only is there an express provision under s. 582(3) of the CA 2016 that allows for recourse to be made to this court under the said provision, it is also supported by precedent, as discussed earlier.

[76] From the language of s. 314, it clearly caters for a member's meeting and not a board of directors' meeting. In *Tay Say Geok & Anor v. Tay Ek Seng Co Sdn Bhd* [1974] 1 LNS 174, the Federal Court in determining the scope of s. 150 of the CA 1965 (in *pari materia* with s. 314) held as follows:

> *The question in dispute is whether "meeting" in this section includes a meeting of the Board of Directors. Pawan Ahmad J who heard this case answered it in the negative and I respectfully agree with him.*
>
> The appellants as Directors applied by Originating Summons for an order under this section to convene a meeting of the Board of Directors. The reason for the application was that a meeting of the Board could not be held as there were only 3 Directors and one of them, Tay Seck Huan, having been absent or refused to attend meetings, there was no quorum of 3 as required by Article 109 of the Company's Articles of Association. As we are only concerned with the meaning and effect of section 150 of the Companies Act, 1965 I do not find it necessary to consider the reason given. *Section 150 appearing as it does in Division 3 of Part V of the Act undoubtedly is concerned only with a meeting of the Company. Quite apart from that the section clearly permits a member, who in terms of section 16(6) of the Act must be a member of the Company, to apply for an order to call a meeting which can only be a meeting of the Company.* A meeting of the Board of Directors is provided for in paragraph 79 of Table A of the 4th Schedule to the Act which is somewhat similar to Article 109 of the Company's Articles of Association. (emphasis added)

[77] As such, there is no basis for an argument to be made that s. 314 of the CA 2016 is the proper recourse that ought to be taken by the plaintiff.

Conclusion

[78] The court has the power pursuant to s. 582 of the CA 2016 to make an order validating any omission, defect, error or irregularity in the management or administration of a company under the Companies Act 2016. This is clear from a plain reading of the section. What is equally clear, as being expressly provided for in the section, is that the absence of a quorum at any meeting of a company or its directors is one such irregularity that can be validated by the court.

[79] In the foregoing, it is the view of this court that the validation of the resolutions is necessary to regularise the plaintiff's statutory affairs. The validation does not affect the defendant's right as a director nominated by the Class B shareholders. It does not in any manner cause any substantial injustice to the defendant.

[80] The application in the originating summons is therefore allowed with costs.